No. 16700

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

JEFFRIES BANKNOTE COMPANY, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

Respondent was found to be in violation of Sections 8(a)(5) and 8(a)(1) because it refused to enter into a labor agreement which had been negotiated by a multi-employer group (Union Employers Section of Printing Industries Association [U.E.S.]) and the union.

Respondent's position is that it was not represented by U.E.S. at the time of the agreement with the union, in that it had effectively exercised its right to revoke its authorization to U.E.S. to negotiate for it. Finally, respondent states that the Board cannot and should not seek to compel it to execute a contract to which it has not agreed.

While the Board's statement of the evidentiary facts in the record is accurate in the main, there are several instances of

inaccuracy which require respondent to make this statement of the facts in the record.

I. The Facts In The Record

A. The Background Of The Bargaining:

In an earlier proceeding (R. 173–4, Res. Ex. 1), the Board had determined that the lithographic production employees of respondent constituted an appropriate bargaining unit. Consequent on that determination and certification, respondent negotiated its individual agreement with the union in 1956, for a term ending February 1, 1958. In the Fall of 1957, respondent and union joined in a series of collective bargaining meetings. No agreement resulted, the principal obstacles to agreement being the union security clause and a profit-sharing plan. This deadlocked situation between respondent and union continued to March 14, 1958 (R. 18).

Concurrent with its negotiations with respondent, the union negotiated as it had for many years past, with U.E.S., a multi-employer group comprised of a majority of the commercial lithographers in the area. While U.E.S. is an organization with a membership structure, it secured individual written authorizations from each member that it represented in collective bargaining (Bd. Brief, p. 3). Respondent was not a member of U.E.S. It never executed the formal authorization (R. 122).

Negotiations between U.E.S. and the union during this period did not result in agreement. As early as March 14, the multi-employer group, acting by its counsel, was compelled to warn the union against its bargaining with individual employers represented by U.E.S. (R. 162–3; G.C. Ex. 3).

On March 14, respondent designated U.E.S. as its bargaining representative. It accomplished this change of representation by a letter notifying the union of that designation (R. 17; 166; G.C. Ex. 4-B). Neither the union nor U.E.S. objected to this designation. Thereupon separate negotiations between respondent and the union were suspended.

Directly upon respondent's designation of U.E.S. as its bargaining agent, the union included for the first time in its negotiations with the group, a request for a profit-sharing plan (R. 18). The Trial Examiner comments (R. 18–19): "The substance of this proposal was that any employer having a profit-sharing plan covering factory employees would 'permit but not compel any member of the bargaining unit, who desires, to participate in the said plan.' It appears that there was then in effect at Jeffries a profit-sharing plan which the Union wanted open to the employees it represented."

Subsequent efforts to attain agreement between U.E.S. and the union were unsuccessful. The union called a strike against all employers represented by U.E.S. on March 20. The strike call was recognized by substantially all lithographic employees of companies represented by U.E.S. (R. 19).

B. The Union's Activities After The Inception Of The Strike, And The Events That Ensued.

While the strike was in progress, the union proceeded to negotiate individual agreements with at least seven companies that were then represented by U.E.S.[1] These individual negotiations were conducted clandestinely.

On March 26, the negotiating committee of U.E.S. met in emergency session at the call of its chairman, who explained that his company had negotiated individually with the union. He furnished each member of the committee with a copy of a memorandum containing the terms of settlement (R. 19–20; 136–138). He said that these terms represented the only basis of settlement for U.E.S.

The following morning, all employers represented by U.E.S. were invited to attend an emergency membership meeting.

[1]In his testimony, Brandt, the union president, lists seven companies as U.E.S.-represented employers with whom he negotiated during the strike period (R. 82–84).

Respondent was present at the meeting. The employers were told of the individual agreements. The terms of the secret settlement were revealed. The negotiating committee then advised the employers that continuation of the strike was futile, and recommended that U.E.S. accept the settlement negotiated by the union and the individual companies. This contained the profit-sharing proposal.

Before a vote was taken, the U.E.S. secretary announced that in view of the union's action in negotiating individual agreements, any employer who wished to revoke his authorization to U.E.S. could do so (R. 20, 140). Two of the members of U.E.S. signed revocation forms. Respondent, who was not a member of U.E.S., but was represented by U.E.S. under an informal designation, advised the committee that if the profit-sharing clause was to be part of the agreement, respondent "would not be a part of it," but that it would go along "on a contract which did not contain the profit-sharing clause which was in the memorandum." (R. 21; 140–141). The employers, by majority vote, decided to settle the strike on the union's terms.

The meeting between the U.E.S. bargaining committee and the union negotiators was held on the same day, tentative arrangements having been scheduled in advance for this meeting.

U.E.S. spokesmen advised the union of the position taken by respondent, and by another company which revoked its authorization. The statements made by U.E.S. spokesmen and Brandt, union president, present the only area of sharply disputed facts in the record[1]. Brandt testified that he was

[1]The Trial Examiner found that Brandt, union president, "made no statement at this meeting reasonably construed as acquiesence in Jeffries revocation of authority" (R. 22). We propose to review the record at this point, primarily not to controvert the Trial Examiner's finding, but to demonstrate that the union was advised unequivocally of respondent's revocation of authority. The union's response to this information is the best evidence of the clarity with which respondent's position was communicated.

advised by U.E.S. secretary that respondent "was not a party to the agreement if the profit-sharing clause was included" (R. 22; 100–101).

The most complete relating of the statement given to the union at this March 27 meeting appears in the testimony of employer representative, Laidlow, who advised the union as follows: (R. 150)

> "I told Mr. Brandt that he could have a contract with the Jeffries Banknote Company if he would remove the profit-sharing clause from his proposal, and he said that he would not do it, and I reiterated it, said, 'This is it; I am not kidding; this is what will take place. You can have a contract with the (195) profit-sharing clause out; you will have a contract with the Jeffries Banknote Company. With it in, you will not have a contract.' "

The testimony of various participants concerning Brandt's reply to this statement is in irreconcilable conflict. It ranges from testimony that Brandt was silent (R. 142) to testimony that the union considered respondent bound (R. 88), and finally testimony that Brandt replied, "We will just have to leave it so they will have to deal with us or we will deal with them." (R. 151).

After this discussion concerning respondent's revocation of authority was concluded, the meeting proceeded routinely. In an attempt to conceal the fact of its negotiations with individual employers, the union compelled the employers to propose as their offer, the terms of the settlement recently concluded between the union and one of the companies (R. 149–150). It contained the profit-sharing proposal which was directed solely at respondent.

The same day, the union accepted the "proposal." A master agreement was executed by the respective negotiating commit-

tees, and then identical contracts were executed by the individual employers.

C. *The Events Transpiring After U.E.S. And the Union Reached Agreement:*

Immediately upon membership ratification of the settlement, the union suggested to its members that they return to work. Respondent's employees did not return to work that day (Testimony of Brandt—R. 89).

On April 1, Brandt and Jeffries discussed the situation. Brandt testified that he was told "that [the union] did not have an agreement, but if the men wanted to come back to work without an agreement," the company would try to resume operations (R. 90). The men resumed work the following day.

With respect to the contractual situation, Brandt testified on cross-examination, that he was advised that now it was necessary for the company and the union to get together to negotiate an agreement, to which he replied that the situation was complicated, and he wanted to consult the union's attorney (R. 24; 91). Jeffries' testimony on this issue is to the effect that Brandt said that he realized there was no agreement between union and respondent and he hoped that they could amicably negotiate one, but that as the situation was complicated, he would like to consult counsel first (R. 120).

Following this meeting, respondent wrote to the union on April 1 (R. 170; G. C. Ex. 9) and the union replied on April 3 (R. 172; G. C. Ex. 10). Respondent's letter proposes to increase its employees by the same amount as the U.E.S. settlement, pending bargaining on an agreement covering its employees. The union's reply is reproduced verbatim in the Board's brief (Brief, p. 8). The union president expresses the thought that he is puzzled by respondent's wish to start negotiations, and states

that respondent advised the union that Printing Industries Association was bargaining for it[1].

Respondent refused to sign the U.E.S. contract. This proceeding followed.

SUMMARY OF THE ARGUMENT

In essence, what the Board seeks to accomplish in this proceeding is to compel respondent to sign an agreement to the terms of which it has never agreed. There is no dispute of the statement that *in fact*, respondent never agreed to the agreement which is the basis of this proceeding. Requiring either party to sign a labor agreement before it has agreed to the terms thereof, is offensive to public policy and public morals and violates the party's rights under the Fifth Amendment.

Respondent effectively and unequivocally revoked its bargaining authorization to U.E.S. before negotiations were resumed after the strike. Even absent the unusual circumstances occasioned by union violation of the Act, respondent had the right to revoke its designation of U.E.S. as its bargaining representative. This was a designation made one week before the union called a strike of its supporters. There can be no question of appropriate unit. The Board had previously certified that respondent's lithographic employees constituted an appropriate unit.

Insofar as it relates to respondent, the Board's authority to legislate "ground rules" as it did in Retail Associates Inc. 120 N.L.R.B. 388, without statutory warrant or support, is challenged.

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[1]By his own testimony, Brandt was told on March 27 that respondent would not be bound by a U.E.S. agreement containing a profit-sharing clause. Morever, at this meeting with Jeffries two days prior to date of Union's letter, respondent's position was reaffirmed. It would appear that the union's letter of April 3 (R. 172) was intended as a statement for the record, without regard to events which had transpired.

Even under these disputed "ground rules", respondent had the right to terminate the agency relationship with U.E.S. These rules permit withdrawal from the multi-employer group under "unusual circumstances". That is the situation presented by the record. The union disregarding prior cautionings by U.E.S. counsel, successfully destroyed any semblance of unity, cohesion or order in the multi-employer group, by bargaining to an agreement with at least seven companies who were represented by U.E.S. The U.E.S. meeting with its principals, and the subsequent meeting with the union committee, were the last steps in the organized chaos successfully generated by the union.

Under any concept of agency relationship, the principal had a right to terminate the relationship, when a substantial number of employers similarly situated, covertly met with the union, thereby repudiating their respective designations of U.E.S.

It is not sufficient to castigate the union's action as the Trial Examiner did as being "flagrantly violative" of the Act. The union should not be allowed to reap a windfall advantage out of its own derelictions. It abuses all concepts of stability in industrial relations to reward a union which has unstabilized an industry.

Respondent effectively exercised its right to revoke its designation of U.E.S. It advised U.E.S. that it would not accept a U.E.S. negotiated agreement if it contained the profit-sharing proposal, and conversely that it would accept the agreement if it did not contain a profit-sharing proposal.

There can be no question about the fact that its position was stated plainly to the union negotiators. The union president's reported indignation is the best evidence that the statement of position was unequivocal.

Despite the manner in which respondent's position was couched, it was unconditional in tenor. There was no element

of *probability* or *conjecture* which would make the withdrawal uncertain or conditional. With rigid precision, the union was told that respondent would not be bound by a U.E.S. contract with a profit-sharing clause. The union insisted on the clause. Respondent's position was absolute and firm.

The union's violation of its statutory obligation to bargain goes to the core of the present situation.

An employer should not be held in violation of his duty to bargain where the union creates the situation by its bad-faith bargaining.

Finally, it is pointed out that this is a refusal to bargain proceeding under 8(a)(5). The Board made no finding of bad faith, or absence of good faith. It made no inquiry in that regard. It elected to make a *per se* determination, on the assumption that this case fell within the purview of *H. J. Heinz Co. v. N.L.R.B.*, 311 U.S. 514. It does not, for the reason that complete agreement as to terms of the new contract was never attained.

ARGUMENT

I. The Board seeks to enforce an order compelling respondent to sign a contract to which it has never agreed, in violation of its rights guaranteed under the Fifth Amendment to the Constitution of the United States.

The remedial order for which enforcement is here sought is unique in Board history in that it seeks to compel an employer to sign a labor contract to which in fact it has never agreed. Early in the history of judicial review of the Act, the Supreme Court noted that the statutory scheme for labor peace excluded any element of compulsion to agree on an agreement. Indeed, were that element present in the Act, it would run counter to rights protected under the Constitution. In *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45, the Court said:

> "The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely

to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel."

The privilege of contract is both a liberty and a property right (*Highland v. Russell Car & Snow Plow Co.*, 279 U.S. 253) protected by the Constitution. In the statutory definition of good-faith bargaining, Section 8(d), Congress carefully limited its definition so as to avoid any abuse of that protected privilege.

In no prior case has the Board attempted to compel a party to sign a labor agreement unless he had previously agreed to all of its terms. In *Heinz v. N.L.R.B.*, 311 U.S. 514, the employer was required to sign a contract after he had agreed to the terms thereof. In *N.L.R.B. v. Shannon & Simpson Casket Co.*, (C.A. 9) 208 F. 2d 545, the employer refused to acquiesce in agreements on specific clauses negotiated by his representative acting within the scope of his apparent authority. This Court enforced the Board's order requiring the employer to bargain collectively. No action was taken or attempted with respect to the negotiated agreements repudiated by the employer. In *N.L.R.B. v. Nesen*, (C.A. 9), 211 F. 2d 559, this Court was confronted with a situation generally paralleling the *Shannon & Simpson Casket Co.* In *Nesen* (which came before the Court on a petition to adjudge the employer in civil contempt) the employer, after cloaking his representative with plenary powers to negotiate, attempted to avoid the results of his negotiation by saying that the agent's powers did not extend to the power to negotiate. This Court held that the employer had agreed to the terms of the agreement, and thereupon entered an order requiring him to execute the agreement.

The Board also cites (Brief, p. 13) *N.L.R.B. v. Gittlin Bag Co.*, 196 F. 2d 158, in support of its position. This citation is of dubious relevance here. In that case, the employer flagrantly refused to accept a complete agreement negotiated over a period of a year-and-one-half by his attorney who had plenary

bargaining authority. The Board's order requiring him to bargain in good faith was enforced. The agreement which he repudiated, was not the subject of any order. In no instance has the Board ever compelled a party to sign a contract unless he had previously agreed to all terms in collective bargaining.

The Board decision in *McAnary & Walter, Inc.*, 115 N.L.R.B. 1029, is relevant here. There, the employer had participated in multi-employer bargaining. *After* the agreement had been completely negotiated by the union and the multi-employer group (to the extent that the secretary of the employer had signed the agreement), the employer attempted to repudiate it and to negotiate a new agreement. The Board, by a three-to-two decision, held that the withdrawal came too late.

In each of these cases, the bargaining proceeded conventionally to a negotiated conclusion without incident. In each instance, the employer attempted to repudiate the work of his designated representative *after* agreement had been attained. In contrast, the record in the case at bar discloses that the multi-employer negotiations did not proceed conventionally. In fact, the union's covert negotiations with individual employers all but destroyed any semblance of orderly negotiations. Again in contrast to the facts in the cited cases, respondent openly notified the union *before* agreement was reached that the multi-employer group no longer possessed plenary powers to represent it. Specifically, the group no longer had authority to bind it to an agreement containing a profit-sharing provision. There was no element of secrecy concerning respondent's withdrawal of authority from U.E.S. The union was well aware of the fact that U.E.S. no longer spoke for respondent, *before* the union resumed negotiations with the weakened multi-employer group.

In other cases, the Board has carefully avoided the issuance of a remedial order which would require an employer to sign a contract to which he had not in fact agreed. Thus in *Stylecraft Furniture Co.*, 111 N.L.R.B. 930, the employer was found

guilty of a refusal to bargain because of his insistence that at least one of his employees sign the contract. The Board said that a broad order requiring him to enter into a contract was not justified since there was not agreement on all subjects. More recently, in *North Carolina Furniture, Inc.*, 121 N.L.R.B. No. 8, the Board rejected the Trial Examiner's broad order requiring the employer to offer to execute an agreement containing all agreed-upon provisions. The Board did not adopt the recommended order because the parties had not reached complete agreement on all the terms of the agreement.

That respondent never agreed in fact to the contract which the Board here seeks to compel it to sign, is not open to question. Whether as a matter of law, it can be said that respondent constructively accepted the new agreement negotiated by U.E.S. is a proposition that we shall consider later in this brief.

To conclude this point of our argument, we submit that the Board's attempt to force respondent to sign an agreement it had never in fact accepted, deprives it of its rights, privileges and property contrary to the Fifth Amendment of the Constitution, and is contrary to the statutory scheme for labor peace.

II. Respondent had unequivocally withdrawn from the multi-employer group before the group resumed negotiations with the union. Respondent was not bound by negotiations between the group and the union subsequent to its withdrawal. The union's bad faith bargaining gave respondent additional warrant for its action.

A. *Respondent Had The Right To Withdraw Authority From The Multi-Employer Group To Bargain On Its Behalf:*

The Board, relying on its statement in *Retail Associates*, 120 N.L.R.B. 388, contends that respondent had no right to withdraw authority from the multi-employer group after the commencement of negotiations.

For this position, it assigns no statutory authority. The Board is saying in legal effect that having once designated U.E.S. as its bargaining representative, respondent forfeited its right to change representatives until negotiations were concluded. Such a drastic delimitation of respondent's rights cannot prevail in the absence of specific statutory authority.

No limitation exists on the right of the individual employer to substitute bargaining representatives in the course of negotiations; nor is there any inhibition on the union's right to designate other bargaining agents during the course of negotiations. The Board can cite no statutory support for its discriminatory treatment of employers who may have designated an association as their bargaining agent.

Granted that the Supreme Court, in *N.L.R.B. v. Truck Drivers Local 449*, 353 U.S. 85, 95–6 concluded that Congress intended

> "that the Board should continue its established administrative practice of certifying multi-employer units and intended to leave to the Board's specialized judgment the inevitable questions concerning multi-employer bargaining bound to arise in the future,"

this expression of confidence in the Board cannot serve as a delegation of legislative power to an administrative agency. There can be little question that this limitation on an employer's right to make changes in his bargaining representatives constitutes a deprivation of his rights which cannot stand without statutory authority.

The statutory origin of the Board's asserted authority to inhibit the employer's right to change bargaining representatives is §9(b) which charges the Board with the responsibility of determining the appropriate unit for collective bargaining. There is a vast body of prior administrative decisions in which the Board was called on to decide whether a single employer or a multi-employer group was the appropriate unit. Not the least significant of these appropriate unit cases is *Retail Associates*,

120 N.L.R.B. 388, where the Board attempted to set down the rules governing withdrawal from group bargaining.

We seriously question whether the designation of U.E.S. by respondent and the subsequent withdrawal of that designation involves an issue of "appropriate unit." The circumstances of this designation and subsequent withdrawal indicate that U.E.S. was merely a bargaining agent for respondent, similar to the designation of an attorney or labor relations specialist. Respondent was not a member of the group. As a matter of record, the Board had previously determined that the lithographic employees of respondent constituted an appropriate unit (R. 18). For five months in the current negotiations, its own officers were its bargaining representatives. Then for a period of thirteen days, U.E.S. was made its bargaining agent by a specific letter of designation (R. 17). To describe the arrangement between U.E.S. and respondent as one involving an appropriate unit question obfuscates a relatively simple matter of agency. The only connection between respondent and the multi-employer was the letter of authorization to act as its bargaining agent given in the closing days of negotiations. Why this designation should be treated as irretrievable and unalterable, thereby depriving the principal (the employer) of his right to terminate the authority of his agent (the multi-employer group) poses a question which cannot be answered by statute or legal precedent.

For its determination that respondent, having once designated U.E.S. as its bargaining agent, was powerless to modify that designation, the Board relies not on statute, but on its own "ground rules" promulgated as a side comment in *Retail Associates*, 120 N.L.R.B. 388, 393. These "ground rules" amounted not to a resolution of interests which the Act left for the Board on a case-by-case adjudication, but to a movement into a new area of regulation which Congress had not committed to it. The attempted promulgation of ground rules constitutes a classic

example of legislation by administrative agency. It cannot be employed to justify a ruling which deprives employers of their freedom in choice of representatives. This proclamation of policy cannot be justified as an administrative determination coming within the scope of the agency's rule-making authority, in the absence of specific statutory support. This Court in *Commissioner* v. *Van Horst*, (C.A. 9) 56 F. 2d 677,9, refused to recognize a particular regulation of the Commissioner of Internal Revenue. It said,

> "It is well settled that departmental regulation may not invade the field of legislation, but must be confined within the limits of congressional enactment."

The plain fact is that respondent's designation of U.E.S. as its bargaining representative created a relationship of principal-and-agent, which was revocable at any time by either party. In the absence of any other legal consideration giving rise to an interest which rendered the agency relationship irrevocable, the principal (respondent) had the right to terminate the agency relationship at any time[1]. This respondent did by its unequivocal, unconditional statement that U.E.S. had no authority to bind it to a labor agreement containing the disputed profit-sharing provisions.

B. *Even Under The Special Ground Rules Promulgated By The Board, Respondent Had The Right To Withdraw Its Authorization From The Multi-Employer Group:*

The Board's ground rules do not establish an absolute bar against an employer's withdrawal from a multi-employer group after the onset of negotiations. The Board recognizes that

[1]The Trial Examiner recognized that the common law rules of agency formed the foundation of the relationship between respondent and U.E.S. (R. 33). He acknowledges that there was an implied condition that the entire course of bargaining was to be conducted exclusively on a multi-employer basis, and that the union's violation of the condition made the designation by respondent revocable. The Board was apparently hostile to this idea.

under "unusual circumstances," an employer may withdraw from the group.

It would be difficult to conjure up a set of facts more unusual than those which confronted respondent on March 27. Only two weeks earlier, after five months of individual bargaining, it had designated U.E.S. as its bargaining agent.

The main issue between respondent and the union was a proposed profit-sharing provision which had economic significance only for respondent. Immediately after respondent had given U.E.S. its authorization, the union countered by adding the profit-sharing proposal to its bargaining demands to the multi-employer group. (The Board piously emphasizes the *standardization* of contract terms as the central feature of group bargaining (Brief, p. 19). The fact is that the union seeks to maneuver respondent into a position where it alone of all employers would be subject to the economic consequences of the profit-sharing provision).

The union, in open violation of its statutory duty [Sec. 8(b)(3)] to bargain with U.E.S., commenced to undermine the group by bargaining with individual employers (R. 19–20). This action the Trial Examiner characterizes as "flagrantly violative" of its statutory obligations (R. 38). As a consequence, the bargaining strength of the group which had just received respondent's bargaining authority, was sharply diminished.

At the emergency meeting of March 27, the employers who had previously designated the U.E.S. Committee to bargain for them, were informed that seven of their number, including two of the most substantial companies, had entered into individual agreements with the union. The spine of the multi-employer group had been broken. What alternatives did the employers have? The Trial Examiner, in his first assumption, says that U.E.S. might have declared that multi-employer bargaining was at an end. This is a sympathetic but not precise definition of the situation. The multi-employer group of 46

companies no longer existed. The union, by its open violation of Section 8(b)(3), and the seven defecting employers, by their repudiation of their written authorization to U.E.S., had jointly destroyed the former unit. (*Gladding, McBean & Co.*, 96 N.L.R.B. 823, is a helpful but not completely analogous situation).

The compelling logic of this statement, supplies the most persuasive precedent. Respondent might well decide to cast its lot with a cohesive group of 45 other printers, and yet might hesitate or refuse to ally itself with a group of 39 companies, when seven others, including two of the most substantial, were outside the group.

The situation should not be confused with that of *Retail Associates, Inc.*, 120 N.L.R.B, 388, where the remaining employers elected to remain in a multi-employer group. In that situation, it was appropriate for the Board to say:

> "Contrary to the union's contention in its brief, the resignation of Tredtke's from the Associates and its signing of a separate contract with the union did not, *in the circumstances here*, destroy the association-wide bargaining pattern—Withdrawal of one member of an association has never been held sufficient to preclude a determination of a unit of the remaining employers to be appropriate particularly when, as here, such withdrawal is acquiesced in by all parties, including the union." (Emphasis supplied.)

The Board in Retail Associates, was not called upon to express its policy opinion on the appropriateness of the unit, in a situation where the employer had elected to proceed individually. Absent only a situation where the changes in group composition may be disregarded as *de minimis* (Furniture Employers Council, 96 N.L.R.B. 151), the withdrawal of certain parties from the group undertaking, by the union's illegal acts, brought the former group to an end.

Under any concept of multi-employer bargaining, the situation created by the union's illegal acts, presented "unusual cir-

cumstances" sufficient to warrant a withdrawal by respondent from his recently delegated representative. The fact that 36 out of the remaining employers (7 out of the original group of 46 had succumbed to the union's individual bargaining) elected to remain in the group, does not reflect on respondent's right to resume individual bargaining. *Foundry Manufacturer Negotiating Committee, et al*, 98 N.L.R.B. 187, presents an interesting analogy. This was a representation proceeding. Several employers had withdrawn from the group. The survivors "reconstituted" themselves as a group. While the Board had occasion to say

> "Likewise, the withdrawal of members from employer associations, does not *per se* preclude a determination that a multi-employer unit comprising the remaining members is appropriate."

it was not called upon to pass on the question of what unit would be appropriate if the remaining members, or some one or more of them, elected to treat multi-employer bargaining at an end.

It is submitted that under the unusual circumstances created by the union on or before March 27, respondent had the right to revoke its authorization.

C. *Respondent Effectively And Unequivocally Withdrew Its Authorization on March 27.*

The keystone of Trial Examiner's order against respondent is his conclusion that respondent's withdrawal of its authorization to U.E.S. was ineffective because it was equivocal and conditional (R. 35). The Board adopted this view (R. 38).

The Trial Examiner characterized the withdrawal as conditional. "If the contract agreed upon suited him, he would consider himself bound; if it did not, he would consider himself not bound." (R. 35). This is not the record.

Respondent flatly told the U.E.S. negotiators that they had no authority to negotiate a contract for it which contained the profit-sharing clause. When the U.E.S. spokesman announced the position of respondent to the union, his auditors understood the plain meaning of his words. In effect, he announced that if the union persisted in its announced stand to secure in the industry contract, a profit-sharing clause which applied only to Jeffries, then respondent would not be a party to the contract. If, on the other hand, the profit-sharing clause was withdrawn, then Jeffries would be bound by multi-employer bargaining.

The Trial Examiner said that to be effective, a revocation of bargaining authority must be *absolute* (R. 35). Respondent's revocation became absolute by the decision of the union to persist in its demand for the profit-sharing clause. Once the union announced that it would not modify its position on the profit-sharing issue, it was then clearly, unequivocally and unconditionally understood by all participants that respondent had withdrawn its bargaining authorization.

The Board stresses its conclusion that respondent's revocation of authority to U.E.S. was not unequivocal. Solely to eliminate any unwarranted inference which might be drawn from this baseless emphasis, we note the judicial definition of "unequivocal" as "capable of being understood in only one way." (*Berry v. Maywood Mut. Water Co. No. 1*, 11 Cal.App 2d 479, 53 P. 2d 1032).

It is respectfully submitted that respondent effectively withdrew from the multi-employer group by its statement to the other employers, and that the employers' statement to the union was sufficient, in law and in fact, to put the union on notice that respondent was no longer bound by these negotiations.

The record, fairly construed, establishes that the union acquiesced in respondent's withdrawal from group bargaining.

Moreover, we contend that when the union proceeded to negotiate in the face of the unit question presented by respondent's withdrawal, it waived any right that it might have on that issue, and that now, by reason of its waiver, it must bargain collectively with respondent on an individual basis.

The Trial Examiner found it unnecessary to analyze the testimony bearing on the union's reply to the announcement that Jeffries had withdrawn from the multi-employer unit. He is content to say "I have found that nothing Brandt said at the meeting of March 27 when informed of Jeffries' conditional revocation of U.E.S. authority, can properly be construed as constituting a waiver by the union of Jeffries' continuing obligations as a constituent of the multi-employer unit." (R. 36).

The record is to the contrary. It bespeaks of the union spokesman's indignation, anger and then resignation at the fact that he would have to deal individually with respondent again. Out of the conflicting versions of the discussion which followed the announcement, the testimony of Laidlaw, temporary spokesman for the U.E.S. committee, appears to convey most accurately, the ensuing discussion. On direct examination, he testified:

> "Q: Did Mr. Brandt at that meeting make the specific statement that an agreement reached between your Negotiating Committee and the Union would be applicable to the Jeffries Company?
>
> A: I don't recall anything like that, because he said something to the effect that he would deal with them, something like that, or they would have to deal with him, 'They will answer for that,' something along those lines." (R. 153).

There is no convincing suggestion in the record that the union ever challenged the right of Jeffries to withdraw from the group. There is a similar absence of any inference that the union representatives failed to understand that the chairman's

announcement meant that respondent had withdrawn from the group. The union spokesman knew that the disorganization of the group had resulted from the union's illegal and yet successful divisive tactics. His attitude conveyed a warning of retaliatory measures which the union would invoke against respondent.

D. *A Refusal To Bargain Order Will Not Be Enforced Against An Employer In A Situation Where The Union Has Previously Been Guilty of Refusing to Bargain In Good Faith:*

The Trial Examiner was emphatic in his denunciation of the bad-faith bargaining of the union in negotiating secretly with individual members of the employer group (R. 38). Nonetheless, he concluded that the union's improper course of action did not provide legal justification for respondent's refusal to be bound by the group contract (R. 31).

It must be noted that the union's bad-faith bargaining was not collateral, unrelated and independent of the series of events occurring on March 26–27 which culminated in respondent's withdrawal of its authorization. Here the union's bad-faith bargaining was the catalytic act which set the stage for respondent's acts which followed.

In *Superior Engraving Co. v. N.L.R.B.* (C.A. 7), 183 F. 2d 783, the Court said:

> "Petitioner has persistently contended that an employer cannot be guilty of a refusal to bargain if the union is not itself bargaining in good faith. This is correct."

This principle of law is peculiarly apposite here where the connection between the union's bad-faith bargaining and the acts of respondent charged to be violative of 8(a)(5) are direct, proximate and almost causal. By an extension of the equitable maxim of "unclean hands," it is appropriate to insist that the union not be permitted to reap the advantages of the Board's

order in a situation where the union appears in the record as the instrumentality which destroyed good-faith bargaining.

Unlike the Trial Examiner, the Board viewed the union's misconduct cavalierly. In support of its position, it relies on *Masters, Mates, and Pilots* (J. W. Banta Towing Co.) 116 N.L.R.B. 1787, set aside on other grounds in 258 F. 2d 66, in which the Board held the "clean hands" doctrine inapplicable. The case at bar is clearly distinguishable in that here the employer's alleged lack-of-good-faith emanates causally from the forces set in motion by the union's improper conduct. In the case cited by the Board, the charging party's alleged misconduct did not induce or precipitate the violations attributed to the responding party.

This is a proceeding where the Board should have followed the philosophy of its decision in *Times Publishing Company*, 72 N.L.R.B. 676, where the Board refused to hold the employer in violation of his statutory duty to bargain because the union created a situation in which "it would do injustice and not effectuate the policies of the Act" to find the employer guilty of bad-faith bargaining. The union in the case at bar should not be allowed to profit by its illegal course of conduct.

III. The Board did not conduct an inquiry to determine whether respondent bargained in good faith. Instead, it rested its order exclusively on its finding that respondent had breached its ground rules applicable to multi-employer bargaining.

The Board held that respondent failed to bargain collectively in good faith as required by Section 8(a)(5). That section provides that it shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees subject to the provisions of Section 9(a). Neither the Trial Examiner nor the Board made any finding respecting the conduct or state of mind of employer during the negotiations (R. 14–38).

The Courts have uniformly held that to support an 8(a)(5) charge the attitude of the employer in bargaining must be found to be antagonistic to agreement. In the present case the employer earnestly sought to attain an agreement. However, agreement on a contract was never achieved, solely because the union persisted in its demand for a profit-sharing provision in the agreement. All other issues were resolved in collective bargaining.

The record is singularly devoid of any evidence that the Board inquired into respondent's state-of-mind as it approached the bargaining table. Beyond question, the Board proceeded on the convenient assumption that respondent's withdrawal from the multi-employer bargaining group was *per se* sufficient to support a finding of violation of Section 8(a)(5). That assumption is contrary to law. There is no simple short-cut for the inquiry required under that section.

The issue before the Board was whether respondent met its statutory duty to bargain collectively in good faith. A principle firmly established by the Courts, but often avoided by the Board, is that the inquiry must always be whether or not under the total circumstances of the particular case, the employer has bargained in good faith.

In its determination of the employer's state of mind, i.e., whether he engaged in bargaining with the sincere desire to reach agreement with the union, the Board may draw inferences from the negotiator's external conduct, as well as from his declarations. Yet in each instance where the Board succeeded in securing enforcement of its order that an employer was guilty of a lack-of-good-faith in bargaining, it was the employer's bad faith in bargaining and not his specific external conduct that sustained the order. Thus, in *H. J. Heinz Co. v. N.L.R.B.*, 311 U.S. 514, 526, the employer's refusal to put his agreement in writing was the manifestation that the employer's state of mind was hostile to agreement with the union. But it was the

employer's hostile state of mind, and *not* the refusal to sign an agreement, that justified the finding of refusal to bargain.

Obviously, the Board's burden would be substantially eased if it could establish a list of specific acts, the commission of any of which would *per se* constitute a violation of the duty-to-bargain-in-good-faith. As a matter of administrative convenience, the development of such a list of specific acts, the commission of any of which constituted *per se*, a violation of 8(a)(5), may seem attractive to those charged with the burden of making a finding as to an employer's state-of-mind. Fortunately, the Board cannot rely on any *per se* determination, but must make an inquiry into the employer's good faith, or the absence thereof, in collective bargaining. Thus, in *N.L.R.B. v. American National Insurance Co.*, 343 U.S. 395, 404, the Court rejected the Board's offer to support its order under Section 8(a)(5) by urging

> "a theory quite apart from the test of good faith bargaining prescribed in Section 8 (d) of the Act, a theory that respondent's bargaining for a management function clause as a counter-proposal to the union's demand for unlimited arbitration, was 'per se' a violation of the Act."

Again, in *N.L.R.B. v. Truitt Mfg. Co.*, 351 U.S. 149, 154, the Court cautioned the Board that its enforcement of a Board order under 8(a)(5) involving a refusal to disclose financial information, did not mean that the Board was warranted in adopting a mechanical approach to its statutory obligation in administering that section, by noting:

> "We do not hold, however, that in every case in which economic inability is raised as an argument against increased wages, it *automatically* follows that the employees are entitled to substantiating evidence. Each case must turn on its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain has been met." (Emphasis supplied.)

Most recently, in *N.L.R.B. v. Insurance Agents*, 361 U.S. 477, the Court rejected a Board's finding that a union was guilty of a refusal to bargain, where the finding was supported solely by proof of the union's commission of certain harassing, unprotected tactics, and where the finding was not supported by any consideration of the union's good faith in conferring with the employer. Holding that the Board's approach involves an invasion into the substantive aspects of the bargaining process, the Court said (361 U.S. 477, 490):

> "The scope of Section 8(b)(3) and the limitations on Board power which were the design of Section 8(d) are exceeded, we hold, by inferring a lack of good faith not from any deficiencies of the union's performance at the bargaining table by reason of its attempted use of economic pressure, but solely and simply because tactics designed to exert economic pressure were employed during the course of the good-faith negotiations. Thus the Board in the guise of determining good or bad faith in negotiations could regulate what economic weapons a party might summon to its aid. And if the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract."

Of particular relevance is the comment of Mr. Justice Frankfurter in his separate opinion (361 U.S. 477, 501, 503–4) where he said:

> "The Board urges that this Court has approved its enforcement of Section 8(b)(3) by the outlawry of conduct per se, and without regard to ascertainment of a state of mind. It relies upon four cases: H. J. Heinz Co. v. Labor Board, 311 U.S. 514; Labor Board v. Crompton-Highland Mills, 337 U.S. 317; Labor Board v. F. W. Woolworth Co., 352 U.S. 938; and Labor Board v. Borg-Warner Corp., 356 U.S. 342. These cases do not sustain its position."

An analogous situation was presented to this Court in *Lloyd A. Fry Roofing Co.*, (C.A.9) 216 F. 2d 273, 276 where the Board

had based its order of refusal to bargain on the employer's failure to invest his bargaining representative with sufficient authority. Rejecting the Board's petition for enforcement, this Court said:

> "However the lack of authority which the bargaining representative possesses in negotiating a labor agreement should not be held to be *per se* a violation of 8(a)(5)."

The deficiency in the record before the Court is clearly demonstrated by a comparison of the instant record with the statement made by the Board in *Southern Saddlery Co.*, 90 N.L.R.B. 1205, where the Board described its function under Section 8(a)(5):

> "Bargaining in good faith is a duty on both sides to enter into discussions with an open and fair mind and a sincere purpose to find a basis of agreement touching wages and hours and conditions of labor. In applying this definition of good faith bargaining to any situation, *the Board examines the Respondent's conduct as a whole* for a clear indication as to whether the latter has refused to bargain in good faith *and the Board usually does not rely upon any one factor as conclusive evidence that the Respondent did not genuinely try to reach an agreement.*" (Emphasis supplied)

In the case at bar, the Board's decision contains not a trace of any attempt to evaluate respondent's conduct at the bargaining table (R. 47–49). Neither did the Trial Examiner whose concluding findings (R. 25–38) were accepted by the Board with modifications, inquire into respondent's state-of-mind at the bargaining table. It is apparent that the Trial Examiner felt that he was bound by the Board's ground rules as enunciated (without statutory warrant) in *Retail Associates*, 120 N.L.R.B. 388.

No consideration was given to respondent's conduct during the bargaining period between the Fall of 1957 and March 14, 1958 (R. 18),—a period during which respondent bargained on a single employer basis; nor to the confusion and uncertainty

prevailing at the U.E.S. meeting of March 27, 1958 (R. 20; 136–141); nor to the fact that respondent, alone among the employers, would be affected by the union proposal on profit-sharing (R. 18–19); nor to the fact that the entire situation was precipitated by the union's bad faith in bargaining with individual members of the multi-employer group.

The Board in its brief (p. 13), urges Section 8(d) in support of its position. That section requires "the execution of a written contract, incorporating any agreement reached if requested by either party." The requirement of executing a written agreement is binding only after the parties have agreed. The vital issue here is whether respondent and union did in fact agree on the terms of a new agreement. Until the parties reached an accord on the inclusion or exclusion of the profit-sharing proposal, neither party could compel the other to sign an agreement. The union negotiators were repeatedly advised at their last meeting with the U.E.S. group that respondent did not agree to their profit-sharing proposal.

This Court is now urged by the Board to enforce its order compelling respondent to execute a contract to which it never agreed. Granting solely for the sake of full discussion that under certain circumstances the Board has the statutory authority to do so, we earnestly submit that in the case at bar, the absence of a factually-supported finding of bad-faith-bargaining creates a legal and moral bar to enforcement.

CONCLUSION

For the reasons stated, the petition for enforcement should be denied and the proceeding dismissed.

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May, 1960.